



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[CWA-05-2016-0014; FRL-9977-83-OARM]

Notice of Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order

AGENCY: Office of Administrative Law Judges, Environmental Protection Agency (EPA).

ACTION: Notice of order denying petition to set aside consent agreement and proposed final order.

SUMMARY: In accordance with section 309(g)(4)(C) of the Clean Water Act (CWA or Act), notice is hereby given that an Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order has been issued in the matter styled as *In the Matter of BP Products North America Inc.*, Docket No. CWA-05-2016-0014. This document serves to notify the public of the denial of the Petition to Set Aside Consent Agreement and Proposed Final Order filed in the matter and explain the reasons for such denial.

ADDRESSES: To access and review documents filed in the matter that is the subject of this document, please visit

https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/Dockets/CWA-05-2016-0014.

FOR FURTHER INFORMATION CONTACT: Jennifer Almase, Attorney-Advisor, Office of Administrative Law Judges (1900R), Environmental Protection Agency, 1200 Pennsylvania Ave., NW; telephone number: (202) 564-6255 (main) or (202) 564-1170 (direct); fax number: (202) 565-0044; email address: *oaljfilng@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Legal Authority

Section 309(g)(1)(A) of the CWA empowers EPA to assess an administrative civil penalty whenever on the basis of any information available EPA finds that a person has violated certain sections of the Act or any permit condition or limitation implementing any such section in a permit issued under section 402 or 404 of the Act (33 U.S.C. 1319(g)(1)(A)). However, before issuing an order assessing an administrative civil penalty under section 309(g), EPA is required by the CWA and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Rules of Practice) to provide public notice of and reasonable opportunity to comment on the proposed issuance of such order (33 U.S.C. 1319(g)(4); 40 CFR 22.45(b)(1)).

Any person who comments on the proposed assessment of a penalty is then entitled to receive notice of any hearing held under section 309(g) of the CWA and at such hearing is entitled to a reasonable opportunity to be heard and to present evidence (33 U.S.C. 1319(g)(4)(B); 40 CFR 22.45(c)(1)). If no hearing is held before issuance of an order assessing a penalty under section 309(g) of the CWA, such as where the administrative penalty action in question is settled pursuant to a consent agreement and final order, any person who commented on the proposed assessment may petition to set

aside the order on the basis that material evidence was not considered and to hold a hearing on the penalty (33 U.S.C. 1319(g)(4)(C); 40 CFR 22.45(c)(4)(ii)).

The CWA requires that if the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator shall immediately set aside such order and provide a hearing in accordance with section 309(g) (33 U.S.C. 1319(g)(4)(C)). Conversely, if the Administrator denies a hearing, the Administrator shall provide to the petitioner, and publish in the *Federal Register*, notice of and reasons for such denial. *Id.*

Pursuant to section 309(g) of the CWA, the authority to decide petitions by commenters to set aside final orders entered without a hearing and provide copies and/or notice of the decision has been delegated to Regional Administrators in administrative penalty actions brought by regional offices of EPA. Administrator's Delegation of Authority 2-52A (accessible at: <http://intranet.epa.gov/ohr/rmpolicy/ads/dm/2-52A.pdf>). The Rules of Practice require that where a commenter petitions to set aside a consent agreement and final order in an administrative penalty action brought by a regional office of EPA, the Regional Administrator shall assign a Petition Officer to consider and rule on the petition (40 CFR 22.45(c)(4)(iii)). Upon review of the petition and any response filed by the complainant, the Petition Officer shall then make written findings as to (A) the extent to which the petition states an issue relevant and material to the issuance of the consent agreement and proposed final order; (B) whether the complainant adequately considered and responded to the petition; and (C) whether resolution of the proceeding by the parties is appropriate without a hearing (40 CFR 22.45(c)(4)(v)).

If the Petition Officer finds that a hearing is appropriate, the Presiding Officer

shall order that the consent agreement and proposed final order be set aside and establish a schedule for a hearing (40 CFR 22.45(c)(4)(vi)). Conversely, if the Petition Officer finds that resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial (40 CFR 22.45(c)(4)(vii)). The Petition Officer shall then file the order with the Regional Hearing Clerk, serve copies of the on the parties and the commenter, and provide public notice of the order. *Id.*

II. Procedural Background

In May of 2016, the Director of the Water Division of EPA's Region 5 (Complainant) and BP Products North America Inc. (Respondent) executed a Consent Agreement and Final Order (CAFO) in the matter styled as *In the Matter of BP Products North America Inc.*, Docket No. CWA-05-2016-0014.¹ The CAFO sought to simultaneously commence and conclude an administrative penalty action under section 309(g) of the CWA against Respondent for alleged violations found by EPA during an inspection of Respondent's petroleum refinery located at 2815 Indianapolis Boulevard in Whiting, Indiana (Facility), conducted from May 5 through May 9, 2014. Under the terms of the CAFO, Respondent admitted the jurisdictional allegations set forth in the CAFO but neither admitted nor denied the factual allegations and alleged violations. Nevertheless, Respondent waived its right to a hearing or to otherwise contest the CAFO, and agreed to pay a civil penalty in the amount of \$74,212. On May 31, 2016, Complainant and Respondent also entered into an Administrative Consent Order that

¹ While titled jointly, the Final Order is actually a separate document, drafted to be signed solely by Region 5's Acting Regional Administrator. It is the execution of the Final Order and its subsequent filing with the Regional Hearing Clerk at Region 5 that will effectuate the parties' Consent Agreement and conclude the proceeding.

incorporated a Compliance Plan setting forth the measures Respondent had already taken, as well as those it agreed it would take in the future, in response to the alleged violations.

On or about June 1, 2016, EPA provided public notice of its intent to file the proposed CAFO and accept public comments thereon. Carlotta Blake-King, Carolyn A. Marsh, Debra Michaud, and Patricia Walter (Petitioners) timely filed comments on the proposed CAFO (Comments). Complainant subsequently prepared a Response to Comments Regarding Proposed CAFO (Response to Comments), which indicated that EPA would not be altering the proposed CAFO. The Response to Comments was mailed to Petitioners, together with a copy of the proposed CAFO, on or about January 13, 2017, and each Petitioner received the materials by January 30, 2017. On or about February 24, 2017, Petitioners timely filed a joint petition seeking to set aside the proposed CAFO and have a public hearing held thereon (Petition).

A Request to Assign Petition Officer (Request) was issued by Region 5's Acting Regional Administrator on May 17, 2017, and served on Petitioners on May 30, 2017. In the Request, the Acting Regional Administrator stated that after considering the issues raised in the Petition, Complainant had decided not to withdraw the CAFO. Accordingly, the Acting Regional Administrator requested assignment of an Administrative Law Judge to consider and rule on the Petition pursuant to §22.45(c)(4)(iii) of the Rules of Practice, 40 CFR 22.45(c)(4)(iii). By Order dated June 16, 2017, the undersigned was designated to preside over this matter, and Complainant was directed to file a response to the Petition. Complainant filed its Response to Petition to Set Aside Consent Agreement and Proposed Final Order (Response to Petition) on July 13, 2017.

III. Denial of Petitioners' Petition

On May 8, 2018, the undersigned issued an Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order (Order). Therein, the undersigned denied the Petition without the need for a hearing on the basis that Petitioners had failed to present any relevant and material evidence that had not been adequately considered and responded to by Complainant.

Specifically, Petitioners raised four issues.² First, Petitioners argued that the alleged violations warranted a higher civil penalty than that assessed in the proposed CAFO and that the occurrence of the alleged violations in a region designated as an Area of Concern warranted an additional penalty of five million dollars. The undersigned determined that while Complainant did not provide a detailed explanation of how the civil penalty assessed in the proposed CAFO had been calculated, it had considered and responded to Petitioners' arguments in its Response to Comments and Response to Petition. The undersigned further found that Petitioners had produced no evidence to support their position or rebut Complainant's position that it had properly implemented the applicable policy governing its calculation and negotiation of the penalty assessed in the proposed CAFO. The undersigned concluded that Petitioners had not met the burden of demonstrating that the matters they raised with respect to the assessment of a higher penalty constituted material and relevant evidence that Complainant failed to consider in agreeing to the proposed CAFO. Thus, Petitioners' claim in this regard was denied.

Second, Petitioners urged that a Supplemental Environmental Project (SEP) be incorporated into the proposed CAFO and that local residents be included in the

² Petitioners described the arguments set forth in the Petition as additions to the Comments they had previously submitted to EPA in response to the public notice of EPA's intent to file the proposed CAFO. Accordingly, the undersigned considered the arguments raised by Petitioners in both the Petition and the Comments.

distribution of funds for SEP projects. The undersigned found that as Complainant had stated in its Response to Comments and Response to Petition, EPA lacks the legal authority to demand a SEP or control the distribution of civil penalty funds. The undersigned concluded that given this lack of authority, the issues raised by Petitioners with regard to a SEP were immaterial to the issuance of the proposed CAFO. Thus, this claim was denied.

Third, Petitioners urged that an independent advisory committee and environmental monitoring program for Respondent's wastewater treatment plant be created. Petitioners then questioned Respondent's community outreach activities, which Complainant had referenced in its Response to Comments. The undersigned found that as argued by Complainant in its Response to Petition, EPA lacks the legal authority under section 309(g) of the CWA to establish advisory committees or environmental monitoring programs or compel Respondent to engage in outreach activities. The undersigned concluded that given the absence of any material and relevant issue not considered by Complainant with respect to the course of action requested by Petitioners, their claim in this regard was also denied.

Finally, Petitioners referred in their Comments and Petition to Respondent having a history of violations. While a violator's history of prior violations is a statutory penalty factor to be considered under section 309(g)(3) of the CWA, the undersigned found that Petitioners had presented no specific claims of violations that were related to those set forth in the proposed CAFO, and presented no argument supporting the notion that any prior, unspecified infraction, had it been considered, should have led to a penalty different than that agreed upon by the parties. The undersigned also noted that

Complainant had addressed claims concerning Respondent's history of violations in its Response to Comments, which suggested that to the extent any prior violations would be relevant to the proposed CAFO, Complainant had adequately considered them.

Accordingly, any claim in this regard was denied.

Having found that Petitioners failed to present any relevant and material evidence that had not been adequately considered and responded to by Complainant in agreeing to the proposed CAFO, the undersigned then addressed Petitioners' requests for a public hearing in their Comments and Petition. Noting that Petitioners appeared to seek a public forum, at least in part, for the parties to explain the meaning of the proposed CAFO to the public, the undersigned observed that section 309(g) of the CWA and the Rules of Practice provide, not for a meeting of that nature, but rather a hearing at which evidence is presented for the purpose of determining whether Complainant met its burden of proving that Respondent committed the violations as alleged and that the proposed penalty is appropriate based on applicable law and policy. The undersigned noted that Petitioners did not specifically identify any testimonial or documentary evidence that they would present at any such hearing. The undersigned further noted that Petitioners did not offer in either their Comments or the Petition any relevant and material evidence or arguments that had not already been adequately addressed by Complainant. For these reasons, the undersigned found that resolution of the proceeding by the parties would be appropriate without a hearing.

The undersigned thus issued the Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order.

Dated: May 8, 2018.

Susan L. Biro,
Chief Administrative Law Judge.
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